

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

December 23, 2009

Charles R. Fulbruge III
Clerk

No. 09-40162
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

KEVIN DUKE

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:01-CR-257-1 & 1:01-CR-201-1

Before GARZA, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Kevin Duke, federal prisoner # 09210-078, appeals the district court's denial of his 18 U.S.C. § 3582(c) motion to reduce his concurrent 262-month sentences for possession with intent to distribute cocaine base. Duke questions the propriety of his sentencing as a career offender and argues that § 3582(c) is applicable to his sentences based upon the amendments to the crack cocaine guidelines.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Duke may not use a § 3582(c)(2) motion to challenge the appropriateness of the district court's application of a career offender enhancement in its calculation of his original sentences. *See United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995). Moreover, because Duke's sentences were based on his prior convictions and not on the quantity of crack cocaine, he was not "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *See* § 3582(c)(2); *United States v. Gonzalez-Balderas*, 105 F.3d 981, 982 (5th Cir. 1997).

The district court's judgment is AFFIRMED, the Government's motion for summary affirmance is GRANTED, and the Government's motion for an extension of time is DENIED as moot.